Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

JULIE K. HERTZBERG,

*Petitioners,*

*versus*

SRAM CORPORATION,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where a plaintiff pleads sexual harassment and a jury finds for the plaintiff on that basis and awards all the types of damages that are before it, may a judge award the equitable remedies of backpay and frontpay without the necessity of plaintiff's explicitly having to plead a constructive discharge.?

Whether Petitioner is precluded from an award of backpay solely because she did not prevail on her retaliation claim where she prevailed on her sexual harassment (hostile work environment) claim and stated in her complaint and in her testimony at trial that she was terminated by Respondent.

Julie K. Flamini respectfully request the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit which reversed the order of the United States District Court for the Northern District of Illinois awarding her front and back pay.

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## OPINIONS BELOW

The district court (per Shadur, Milton I.) December 23, 1996 opinion reported at 1996 U.S. Dist. LEXIS 19210 striking Respondent's affirmative defenses and answer to certain averments.

The district court's (per Shadur, Milton I.) opinion reported at 2000 U.S. Dist. LEXIS 926, 82 Fair Empl. Prac. Cas. (BNA) 412 (January 31, 2000) awarding Petitioner backpay and frontpay on her claim of sexual harassment (the jury having awarded petitioner $20,000 in punitive damages in that respect).

The district court's (per Shadur, Milton I.) March 3, 2000 entry of judgment for back and front pay and punitive damages and memorandum opinion. The opinion is unreported. It is reproduced in the Appendix at App. 31a-53a.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Hertzberg v. SRAM*, 261 F.3d 651 (7th Cir. 2001).

## JURISDICTION

The Court of Appeals entered its judgment on August 2, 2001. App. at 1a. the jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioner, Julie K. Flamini, sued her former employer, respondent, SRAM Corporation ("SRAM"), on claims of sexual harassment based on a hostile work environment theory in violation of Title VII of the Civil Rights Act of 1991, 28 U.S.C. § 1343, 28 U.S.C. § 1331 and

42 U.S.C. §§ 2000e, *et seq.*. Petitioner also claimed that she was unlawfully discharged in retaliation for her complaints about sexual harassment of her co-worker and her supervisors. Prior to her discharge, Petitioner advised Respondent's plant manager that she was not prepared to remain at SRAM unless her sexual harassment grievance was addressed satisfactorily.

### A. Course of Proceedings Below.

The jury found in favor of Flamini on her sexual harassment (hostile environment) claim and was awarded punitive damages. The jury rendered a verdict in favor of SRAM on her retaliatory discharge claim. The district court denied Respondent's motion for judgment as a matter of law. Final judgment was entered on March 3, 2000 in the amount of $71,829.18 (comprised of the jury's verdict of $20,000 and the district court's lost pay award of $51,829.18).

Although Respondent's appeal did not seek to upset the jury's finding of liability on Petitioner's sexual harassment claim, respondent sought to take away the monetary award by the jury for punitive damages and the monetary lost pay award by the district court based on the jury's finding in Petitioner's favor on her sexual harassment claim.

42 U.S.C. §2000e-5(g)(1) provides:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer,

> employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

"The final decision that terminated her employment was a decision made by SRAM. And that therefore, in the straight but-for and proximate cause concept, supports the idea that lost wages are placed squarely on SRAM's doorstep." App. 43a-44a. [District court's 12/16/99 tr. at 8-9) attached to district court's 3/2/00 opinion].

**B. Statement of Facts.**

The statement of facts in the opinions below are adequately stated in the opinions of the District Court and the Court of Appeals reproduced in the prior sections.

By the time Petitioner began working for respondent at its Elk Grove facility when she was age 22, she already had six years of bicycle industry experience with the same employer. Respondent manufactures gear shifts for bicycles. In 995 when Petitioner began working for SRAM there were approximately 125 employees in the Elk Grove Village facility and some 300 people worldwide and $65 million in revenues. By 1997, respondent had grown to 1500 employees worldwide. Petitioner began work on November 6, 1994 as their shipping coordinator until her termination in February 1995. Shortly thereafter, she found a new job as an administrative assistant and by the time of trial she had worked continuously for the same employer for four and one-half years.

Brian Lester, who became her direct supervisor, and George Margelos, the plan supervisor, interviewed Petitioner for her job. She was hired right away as the shipping coordinator. Lester had previously worked with Margelos at

another job and began working for respondent in October 1994. Lester testified that he had a small amount of input on hiring decisions and that Margelos made the hires. Petitioner's overall job performance was good. Three weeks after Petitioner began working, Manuel Loayza was hired. Her difficulties began. Loayza constantly told Petitioner that because she was a woman she could not do her job as well as a man and he told her that more than 100 times. Petitioner's job as shipping coordinator changed. Loayza assumed the role of calling the trucks and getting them ready for transporting the products while Petitioner continued to be responsible for all the inventory control and preparing the shipments themselves.

Respondent had a policy handbook which was given to Petitioner on her first day of work. She was told to take it home that night, read it and return it the next day. The receptionist gave her a form to sign to show that she had taken it home to read it. The receptionist took the policy handbook from Petitioner and she never saw it again.

Lester testified that respondent did not provide any management level training about its policies or practices for employees when they were hired at management level. Margelos was the general manager and took care of Human Resources. Lester testified that he never knew of Petitioner's complaint to Margelos about the behavior of Loayza.

After Loayza made the remarks about women not being able to do their job as well as men, Petitioner complained several times to her supervisor Lester, to the plant manager Margelos, and to Dee Whatmore, who was doing the payroll and some personnel duties. Petitioner told Lester that Loayza's comments were degrading and she needed Lester to take care of it. Loayza's comments, however, did not stop, nor did she perceive that Loayza's treatment of her had changed in any way since she

complained to Lester. The second time she complained to Lester about Loayza's comments and how upsetting they were to her, Lester told her "You are being too emotional, just like a woman." Petitioner last complained to Lester about Loayza in a meeting in Lester's cubicle in mid-January 1995. She told him she couldn't take it anymore. He had to do something about Loayza's constant comments. It was degrading and put her down, making her feel inferior because she was a woman. Lester responded by putting his hand on her thigh, telling her he would take care of everything. Petitioner was surprised and "mortified" by Lester's touching her; she stood up and walked away. Afterwards, Petitioner talked at lunch with Ms. Whatmore about what Lester had just done, and the problem of Loayza's continuing remarks that because she was a woman she could not do her job as well as a man. After lunch, Whatmore went with Petitioner to Margelos's office to talk about Loayza's improper comments and Lester's improper touching. Whatmore told Petitioner that Lester had also improperly touched her when she was new to the company on an occasion when Margelos was also present. Whatmore was uneasy around Lester ever since.

> Okay. When I was in George's office, Brian came in and George introduced me. And Brian reached over to grab my neck or put his arm around my shoulder. And shrugged it off and told him, you know—I extended my hand and said you can shake my hand. And you know, he looked at me with a smirk and he showed me his two hands and said with these two hands I can twist and break your neck. And then he smirked. And I looked at him and I looked at George and I was shocked.

Margelos seemed to shrug off the complaint but advised that he would look into things and get back to them. Whatmore

testified that she did not know that under respondent's procedures she was supposed to go to the president of the company.

After the meeting with Margelos, the relations with Loayza did not improve. Petitioner again talked to Margelos, the relations with Loayza did not improve. She again talked to Margelos about Loayza's continuing refrain that because Petitioner was a woman she could not do her job as well as a man. She told Margelos that if he could not stop Loayza's constant harping on her inadequacies because she was a woman she would be forced to resign.

Petitioner talked to Whatmore about whether there might be other jobs that she could work or apply for within the company. Petitioner liked working for respondent and did not want to leave. Whatmore told her to talk to the customer service and accounting managers who usually had openings. She also told Whatmore that if things did not get better with Loayza and Lester, she would have to leave respondent. Whatmore testified that to the best of her knowledge, Petitioner never notified respondent that she was quitting. Dee Whatmore telephoned Petitioner on the morning of her deposition. When Petitioner advised her that SRAM's attorneys had said that she had resigned, Whatmore laughed and told Petitioner that it was ridiculous.

With this meeting with Margelos, Petitioner ceased going to Lester about her complaints, he having been of no help. On February 6, 1995, three days after she and Whatmore met with Margelos, Lester told Petitioner that she was being too disruptive with all of her complaints, and that she was being terminated. Petitioner telephoned her husband and then telephoned Andy Carren, Respondent's employee who got her the interview at the company, to advise that she had been fired. He said that he would look into it and would call her back. She never heard from him again. Roger

Hertzberg testified that Petitioner telephoned him on the cell phone from her car driving home that Brian Lester had fired her. She told him that Lester told her she was being let go because she was being too disruptive because of her complaints about Loayza. The following Monday she also telephoned Dee Whatmore to tell her she had been fired. As soon as she hung up the telephone, she went to see Margelos to ask whether he knew that Petitioner had been fired.

Loayza testified that Lester talked to him in January 1995 about firing Petitioner. Loayza testified that he was present at a meeting in which Lester admitted that he had improperly touched Dee Whatmore and Petitioner.

Loayza testified that he knew Petitioner was offended because he would say things about women not being able to do their jobs. Loayza also stated that Margelos never talked to him about it.

Margelos testified that respondent's written policy on harassment was to first talk to your supervisor, then if you are not happy with the results, you keep moving it up the chain of command, all the way up to Stan Day, the president. Margelos didn't know if he had told that to Petitioner. Although Margelos testified that Petitioner had come to him on a number of occasions complaining about Loayza (during the three months that Petitioner worked at respondent, he testified there were two or three complaints repeated over an interval of every two or three weeks). Margelos only wrote up one of the complaints. He never wrote up the one where Petitioner complained that Lester touched her even though he testified that she was upset and agitated and Whatmore was concerned enough to come to the meeting with her. He never wrote down any of Petitioner's complaints about Loayza's comments that she couldn't do her job as well as a man because she was a woman. He didn't know that he was supposed to fill out a form. Although Margelos documented

one of Petitioner's complaints in a December 15, 1994 memorandum that Loayza had taken her procedure book home for the weekend to review and had never brought it back, and Margelos wrote a follow-up memorandum on December 20, 1994 stating he talked with Petitioner regarding that complaint and she said things were fine, he also later testified that he knew after he wrote the December 20, 1994 memorandum that things were not fine. Margelos testified that primarily Petitioner's complaint was Loayza talked to her in a demeaning way: she couldn't do things because she was a woman. Margelos did not write those incidents up. He did not write up Petitioner's complaints about Loayza's comments. Margelos also did not write up the complaint made by Petitioner and Whatmore about Lester touching her knee, even though it was improper and not something he would do. At trial, Margelos first testified that he did talk to Loayza, but recanted that testimony, standing by his deposition testimony in July 1997 that he was not sure that he talked to Loayza directly, but through Lester and he let Lester run his own shop.

> Question: Did you view the remarks as derogatory or bad when Manuel Loayza would tell her that because she was a woman she couldn't do her job correctly?
> Answer: Yeah, I though that was. He shouldn't say that, and I told him so. I may not have told him so directly. I may have done it through Brian.
>
> Question: Did you work through Brian? Did you ever tell Brian to do things where you wouldn't address it yourself?
> Answer: It depends on his day-to-day relationship with the people. You know, I really kind of made sure that I didn't—I really—didn't really get in the way. I just let

> Brian run his organization without a lot of interference. That's pretty much how I ran the whole thing.

Margelos testified that he was aware that Petitioner wanted to get away from working with Loayza because she had talked to him about transferring out of the department. Margelos talked about Petitioner's request with Jeff Shupe, respondent's vice-president of manufacturing, and whether the transfer could happen and Margelos made the decision not to let her. Petitioner testified that Lester told her specifically that she was terminated. Lester testified that he never talked to her but that she had tendered her resignation to Margelos. Margelos testified that Plaintiff tried to rescind her resignation and that he made the decision not to let her. Loayza testified that he knew that Lester terminated Petitioner.

Petitioner liked her job with respondent, that it was a growing company, and loved the bike industry. After being fired, she wrote to the President of respondent, Stan Day. She told him in the letter that she was terminated over problems with her boss and her coworker, including her telephone number so that he could call her if he had any questions. She wanted to summarize some things that had happened, that she was having problems with Loayza and that Lester knew of the problems but did not take care of them. Petitioner wanted to write a letter that would hopefully spark his curiosity so that he would call her back. She asked in the letter that if he had any further questions to please call her, hoping that he would so that she could elaborate on the problems she had at SRAM. She never received a response from Day.

Later, Petitioner spoke with Whatmore. Whatmore suggested that Petitioner file a charge with the Equal Employment Opportunity Commission and gave her a

lawyer's name. After Petitioner received the papers, she met with Whatmore who reviewed the charge with her, and told Petitioner that she could use her as a witness. Whatmore testified that Petitioner had complained to her about Loayza some 10 to 12 times, that he was picking on her by telling her what he could do her job better because he's a guy and she's just a girl. Whatmore had told Petitioner to present her complaints to her manager, Brian Lester. The procedure for making complaints at respondent was to go to your immediate manager, in Petitioner's case, Brian Lester. If she didn't get anywhere with Lester, she was to see the plan manager George Margelos, who was supposed to handle it. Under the procedures that existed in 1995, Whatmore testified that Petitioner had done everything that she was required to do. In 1998, Whatmore was promoted to Human Resources manager. Whatmore testified that after she became human resources manager in 199, for the first time she became aware of other requirements in order to file a complaint: an employee should fill out a three-ply form, see the plant manager and if there were any further problems see the vice president of the factory. She testified that the manager and his subordinate were to fill out the form. Then it would be shown to the HR person to be witnessed. It would then be noted and placed in the person's file. Whatmore testified that she had occasion to look at Petitioner's file before Petitioner left respondent and there was no such form in it. Whatmore testified that Petitioner complained to her about Brian Lester, her manager. Petitioner had scheduled a lunch with her in order to talk to her about him. Petitioner told her that she had gone to Lester to make her complaint about Loayza just as Whatmore had told her to do.

After leaving respondent, Petitioner ran into Loayza at a show sponsored by the Chicago Area Bike Dealers Association. He told Petitioner that he had resigned from respondent and that respondent's lawyers had coached them

[Lester, Margelos and Loayza] on what to say regarding her case. Loayza testified that Lester started crying at the meeting with the lawyer and Stan Day.

The District Court Proceedings

After resolution of Petitioner's legal claim by the jury, the district court resolved Petitioner's equitable claim in light of the determination of the jury and awarded Petitioner $51,829.18 of front pay in lieu of reinstatement as an equitable remedy following *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998). The district court concluded that it could take into account the fact that Petitioner was no longer working at respondent in fashioning equitable relief in accordance with the jury's finding.

Respondent argued that because Petitioner did not prevail on her retaliatory discharge claim and her case was not tried before the jury on a constructive discharge theory, Petitioner could not seek an award of any monetary damages. The district court ruled against respondent.

As this Court has already ruled orally, a portion of SRAM's numerous conceptually unsound submissions during the course of this litigation—in this instance, opposing any backpay or frontpay award at all—is premised on the fallacious assertion that the case was not tried by Hertzberg on a constructive discharge theory.

That is really a red herring. Here the obvious reality is that Hertzberg's statement that she was not prepared to remain at SRAM unless her sexual harassment grievance were to be addressed satisfactorily flowed directly from the harassment itself, the existence of which has been confirmed by the jury verdict. And when Hertzberg almost immediately asked SRAM to reconsider its treatment of her statement to that effect as the equivalent of her having quit her job, her

request was refused by SRAM without any reason other than it would not entertain any such reconsideration. As this Court has previously ruled, under those circumstances the necessary proximate causal connection links up the jury-confirmed sexual harassment with the adverse employment action of Hertzberg's loss of employment at SRAM.

The district court addressed SRAM's reliance that Petitioner could only recover money damages in the form of backpay and frontpay if she had pled and proved constructive discharge. The district court determined that the jury finding that respondent's conduct reflected its malice or reckless indifference to Petitioner's rights, included an award of punitive damages and entitles Petitioner to equitable relief flowing from the conduct based on the jury's finding, not on how plaintiff posed her claim in her complaint and at trial. The district court had concluded that because the jury ruled against her on her retaliatory discharge claim and a question that the jury asked while deliberating, that meant that she quit, respondent failed to rehire her, and her equitable relief is reinstatement.

* * *

First, as to the jury's award of punitive damages, SRAM itself characterizes the conduct to which Hertzberg was subjected as 'very close to the (admittedly amorphous) line between actual sexual harassment and non-actionable offensive conduct' (Mem.4). Even were that so (and that of course reflects SRAM's self evaluation, scarcely that of an unbiased source), the resolution of which side of the line the conduct occupied—importantly, including the question of SRAM's intention—would have presented a classic situation for jury resolution. It was well within the jury's province, having heard the testimony, to make the necessary credibility determinations (which are solely the jury's prerogative) and to find SRAM's failure to respond appropriately to the complained of—conduct reflected its 'malice or reckless

indifference' to Hertzberg's rights to an extent that was sufficient to support a punitive damages award. That facet of the SRAM Motion is denied.

As to the lost pay award, SRAM builds its Motion on a false foundation. It speaks of the 'jury's conclusion that Plaintiff's discharge was not unlawful' (Mem.5) and goes on to say that Hertzberg's 'potential entitlement to backpay was extinguished when the jury found that her discharge from SRAM was valid and not unlawful' (*id.*) That however, mischaracterizes the record. Here is the portion of the jury instructions (part of SRAM's Instruction No. 1) that described Hertzberg's claim on which the jury ultimately ruled against her and in SRAM's favor:

> In addition, it is unlawful under Title VII for an employer to terminate an employee for complaining about sexual harassment. Plaintiff claims that her employment with Defendant was terminated because of her complaints about sexual harassment. Defendant also denies this claim.
>
> And attached to this memorandum order as Ex. 2 is the instruction that set out the elements Hertzberg was required to prove to prevail on that claim. That instruction, though labeled 'Court's Instruction 12 and SRAM's proposed instructions 4 and 5, all of which spoke of 'adverse employment action' in terms of 'termination of employment.'
>
> There of course is no way to determine precisely which one or more of the elements of Hertzberg's unlawful retaliation claim the jury found she had failed to establish. Nor is that answer definitively provided by any

necessary infers from the jury's question on that score or from this Court's response to that question (which, as always, was decided after conferring with counsel for both parties). But it is fair to conclude that the jury decided that what might reasonably be viewed as Hertzberg's termination under either side's scenario—that is, SRAM's refusal to permit Hertzberg to withdraw her resignation or her stated intention to resign—was not in retaliation for her complaints of sexual harassment. That after all is clearly the effect of the jury's verdict on Hertzberg's unlawful retaliation claim.

That however was no the question that this Court, as contrasted with the jury, was called to resolve. Remember that it is for this Court and not the jury to have decided on the recoverable compensatory damages stemming from SRAM's unlawful sexual harassment, which the jury did find to have occurred (in that respect, see attached transcript of this Court's oral ruling of December 16, 1999). And in that regard, this Court's December 16 oral ruling also expressed the basis on which Hertzberg's lost income is a proper component of her damages on her proved sexual harassment claim, rather than being negated by the adverse jury verdict on the unlawful retaliation claim. [Footnote 2: As these references to the December 16 ruling indicate, for the most part SRAM's current Motion advances contentions that it has made before and that this Court has previously found wanting. This is equally true of the

> objections referred to in the next paragraph of the text.]
>
> * * *
>
> So I am not going to speculate—that maybe they could have given plaintiff the benefit of that one and nevertheless rejected the retaliation. The two factors that control are one, that giving you the best read, and I think probably the fair one given their question—the jury determined that in fact Ms. Hertzberg had quit. And because the retaliation claim was framed to them in terms of terminations versus quit, they ruled in your favor on that one. But the thing that you are missing is the other part of what the jury did—and that is, the jury expressly had to find in order to award punitive damages that your client had conducted itself with malice and deliberate indifference. I can't ignore that. And then tells us, you see that when the plaintiff had at that stage was that she quit. She asked to come back. She had to come back in an environment that the jury found had been maliciously created or created with deliberate indifference to her right not to discriminate against.

Emphasis in the original.

Seventh Circuit

The Seventh Circuit affirmed the judgment with respect to the award of punitive damages and ruled that the district court did not err when it failed to grant respondent's motion for judgment as a matter of law on Petitioner's punitive damage claim. The Seventh Circuit reversed that portion of the district court's judgment awarding front and

back pay because plaintiff had not alleged constructive discharge or did not advance any other theory of discriminatory discharge to the jury, finding "But in the absence of constructive discharge, a plaintiff subjected to sexual harassment, no matter how egregious, is not "made whole" by the equitable remedy of back pay." App. at 12a.

The Seventh Circuit erred in requiring that the complaint explicitly plead constructive discharge. First, it is wrong because constructive discharge is not a cause of action. The cause of action is sex discrimination under Title VII. Second, notice pleading does not require that constructive discharge be pled. To the extent that the Seventh Circuit required that Petitioner plead and prove something separate and apart from sex discrimination, that is wrong because constructive discharge is not the cause of action. As the district court noted, Petitioner did establish a but for determination between her discrimination and her becoming unemployed.

The Seventh Circuit erroneously concluded from the record that Petitioner made no claim for failure to promote. *Id.* at 12a. However, Dee Whatmore testified at trial that Petitioner asked to be transferred so that she could work in respondent's Chicago office and there were jobs in customer service and accounting that were always available and Petitioner was qualified to do the work. Margelos testified that he made the decision that she could not be transferred after speaking with respondent's vice-president of operations, Jeff Shupe. The Seventh Circuit concluded, possibly from the erroneous statements made in respondent's reply brief on appeal, that Petitioner made no claim for failure to promote or discriminatory discharge, and consequently Petitioner was not entitled to backpay because she did not advance any other theory of constructive discharge. Although Petitioner did not prevail on her claim for retaliatory discharge under Count II of her complaint, her failure to prevail on that claim did not

mean that respondent did not discriminatorily fire her because the two elements, firing and retaliation, are intertwined. Furthermore, Count I of her complaint in which she alleges sexual harassment (hostile work environment), Petitioner claims that Lester terminated her in violation of Title VII. That allegation in her complaint, which she testified to at trial, was sufficient for her to obtain an award of backpay. Therefore equitable relief, including backpay, could be awarded to Petitioner. Petitioner did advise Margelos that if the problem was not addressed, she would have to leave. Margelos, apparently, took that to mean that Petitioner was resigning. He also testified that he made the decision that she could not come back. Margelos also testified that he left things to Brian to handle. Petitioner stated in her complaint and at trial that Lester told her she was fired. Loayza also testified at trial that he knew that Lester fired her and that Lester talked to him about firing her at one point even though Loayza told him that there was plenty of work for both he and Petitioner to do.

## REASON FOR GRANTING THE WRIT

### 1. THE UNITED STATES SUPREME COURT HAS RECENTLY ACCEPTED CERTIORARI IN *SWIERKIEWICA V. SOREMA* AND DISPOSITION OF THAT CASE WILL HAVE BEARING ON THE ISSUES IN THIS CASE.

In *Swierkiewicz v. Sorema, N.A.*, an unreported decision of the Second Circuit, the entire issue is how specific must a complaint be in order to proceed to trial. The Seventh Circuit erroneously concluded that Petitioner had not alleged a failure to promote claim or any theory of discriminatory discharge for sexual harassment under Title VII that would entitle her to an award of backpay, given the standard of notice pleading in federal court and post-

complaint "discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed issues of fact. *Conley v. Gibson*, 355 U.S. 41, 47 (1967). Seventeen years later, in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), another civil rights action, the Court again cautioned the lower federal courts that "the complaint should be construed favorably to the pleader," *id.*, and allowed to proceed through discovery and then through summary judgment or trial. *Id.* at 250. Despite the holdings in *Conley* and *Scheuer*, a number of lower federal courts continued to hold civil rights plaintiffs to a higher pleading standard than otherwise required by Rule 8(1)(2). In 1993, the Court held that any such heightened pleading requirement was improper. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). "We think it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168. In *Swierkiewicz*, the Second Circuit chastised Mr. Swierkiewicz for his "conclusory" allegations, App. at 3a, which, it held, were insufficient to "raise an inference of [national original and age] discrimination." *Id.* at 3a-4a. The District Court also rebuked Mr. Swierkiewicz for the same alleged defects *Id.* at 7a (dismissing the amended complaint for alleging "in a conclusory fashion that he was terminated as a result of his age and national origin.") These rulings were clearly improper. Swierkiewicz amended his complaint five times and pled that he was fired by Sorema on account of his national origin and his age. Under the notice pleading practice of the Federal Rules, that was sufficient to take his case past the pleadings stage and on to either summary judgment or trial. *Accord Scheuer v. Rhodes*, 416 U.S. at 250.

While *Swierkiewicz* was disposed of by the court on a motion to dismiss, the principles are the same to *Hertzberg*.

Petitioner brought her claim for sexual harassment (hostile work environment) in which she claimed that she was discriminatorily discharged by respondent. She introduced evidence at trial that she was fired. She introduced evidence at trial that she was not transferred to available positions in respondent's Chicago office. She introduced evidence at trial that Margelos discriminated against her by taking her statement that she would have to leave if he did not address her concerns about sexual harassment as a quit, and then determined that he would not rehire her. Respondent was put on notice of her claims from her well-pled complaint, through discovery and at trial. The jury only decided that she was not retaliated against by respondent as a result of her claimed discharge. The jury made no determination that she was not fired. Therefore, the district court was free to apply the equitable relief from the jury's determination from the evidence and Petitioner's claim and award her backpay and other equitable relief it specified.

*Swierkiewicz* sought a writ of certiorari on the basis that only the Second Circuit has held that an employment discrimination plaintiff must plead the elements of a *McDonnell Douglas prima facie* case to withstand a defense motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Swierkiewicz* claims that there are five other courts of appeals, including the Seventh, that have held that the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) regimen is an evidentiary standard to be used at the summary judgment or trial stage of a discrimination case. *See, e.g. Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) ("Sparrow did not have to make out a *prima facie* case of discrimination in his complaint");*Weston v. Commonwealth of Pennsylvania*, 2001 U.S. App. LEXIS 10514 at *22 (3d Cir. 2001) ('eschewing any reuqirment of fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v.* Schmidt, 153 F.3d 516, 518 (7th Cir. 1998)

(complaint need not set out the elements of a *prima facie* case): "I was turned down for a job because of my race is all a complaint has to say") (internal quotations omitted); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) ("the *prima* facie case . . . analysis is an evidentiary standard—it defines the question of *proof* plaintiff must present to create a rebuttable presumption of discrimination . . . Under the Federal Rules of Civl Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim") (emphasis in original); and *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) ("A plaintiff need not make a *prima facie* showing to survive a motion to dismiss provided he otherwise sets forth a short and plain statement of his claim showing he is entitled to relief."). The Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) confirms that *McDonnell* Douglas was intended as a means (though not the only means) for assessing whether a plaintiff has enough evidence to take his case to a verdict at trial. However, the Seventh Circuit in *Hertzberg* has, at the trial phase, retrospectively imposed higher standards on what must be alleged in a complaint than what this Court has stated notice pleading must provide. The decision in the pending case of *Swierkiewicz* would support remand to the Seventh Circuit. Petitioner has clearly put respondent on notice of both a claim of sexual harassment, discriminatory discharge, and failure to promote in violation of Title VII in Count I of her complaint. Notice pleading only requires that, and Petitioner was free to develop her case through discovery and at trial. During cross examination, Margelos admitted that he made the decision that she could not be transferred and made the decision that she could not be rehired as he took her statement that she would have to leave if things did not get better as a quit and then decided she could not be rehired. As he also testified that he left everything to Brian Lester to handle and Petitioner testified that she was fired by Brian Lester, it is a logical extension of her complaint and the

evidence she introduced at trial that the jury's award of punitive damages supported her claim of discriminatory discharge. If the Seventh Circuit requires that the complaint explicitly plead constructive discharge, it is wrong because constructive discharge is not the cause of action; sex discrimination is the cause of action. Second, notice pleading does not require that constructive discharge be pled in order for Petitioner to receive an award of frontpay and backpay. The district court correctly determined that Petitioner established a but for determination between her discrimination and her becoming unemployed to which she was entitled to the equitable relief he awarded.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 00-1825

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JULIE K. HERTZBERG, Plaintiff-Appellee,

v.

SRAM CORPORATION,
Defendant-Appellant.

February 23, 2001, Argued

August 2, 2001, Decided

**PRIOR HISTORY:**
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 96 C 6944. Milton I. Shadur, Judge.

**DISPOSITION:**
AFFIRMED IN PART; REVERSED IN PART.

**COUNSEL:**
For JULIE K. HERTZBERG, Plaintiff - Appellee: Suzanne McCarthy, Chicago, IL USA.

For SRAM CORPORATION, Defendant - Appellant: Neal F. Perryman, LEWIS, RICE & FINGERSH, St. Louis, MO USA.

**JUDGES:**
Before FLAUM, Chief Judge, and RIPPLE and WILLIAMS, Circuit Judges.

**OPINION BY:**
RIPPLE

**OPINION:**

RIPPLE, *Circuit Judge*. Julie Hertzberg brought this action against her former employer, SRAM Corporation ("SRAM"), for sexual harassment and retaliatory discharge. A jury returned a verdict in favor of Ms. Hertzberg on her sexual harassment claim and awarded her $ 20,000 in punitive damages. However, the jury returned a verdict for SRAM on the retaliatory discharge claim. The district court nevertheless granted Ms. Hertzberg equitable relief in the form of back and front pay. On appeal, SRAM challenges all of these awards. For the reasons set forth in the following opinion, we affirm in part and reverse in part the judgment of the district court.

## I

## BACKGROUND

### A. Facts

In November 1994, SRAM, a manufacturer of bicycle components, hired Ms. Hertzberg as a shipping coordinator in its Elk Grove Village, Illinois warehouse. Almost immediately, Ms. Hertzberg experienced difficulties with Manuel Loayza, a co-worker. On numerous occasions, Loayza told Ms. Hertzberg that she was not as qualified as he, that women could not perform shipping responsibilities as well as men and that he would take over her job. Ms. Hertzberg also had disagreements with Loayza about shipping procedures and about a book that Loayza had failed to return to Ms. Hertzberg.

Ms. Hertzberg was upset by Loayza's comments and, according to her testimony, complained to her immediate

supervisor, Brian Lester, on at least three occasions.[1] During one of their meetings concerning Loayza, Lester told Ms. Hertzberg that she was "being too emotional, just like a woman." R.68 at 34. The last time that Ms. Hertzberg spoke to Lester concerning Loayza's remarks, Lester put his hand on Ms. Hertzberg's knee and told her he would take care of it. Ms. Hertzberg perceived that Lester was unable or unwilling to curb Loayza's behavior. Consequently, she ceased bringing her complaints to Lester.

On the advice of another SRAM employee, Dee Whatmore, Ms. Hertzberg complained to plant manager George Margelos concerning Lester's and Loayza's behavior toward her. Whatmore accompanied Ms. Hertzberg to Margelos' office; there, Ms. Hertzberg reported Lester's actions, as well as detailed the problems that she had been experiencing with Loayza. According to Ms. Hertzberg, Margelos "seemed to shrug . . . off" her concerns. R.68 at 54. Following this meeting, Margelos had at least one discussion with Lester concerning the propriety of Lester's touching Ms. Hertzberg. Ms. Hertzberg apparently did not have any further difficulties with Lester. The record is inconsistent regarding the actions Margelos took with respect to Loayza. Margelos testified to at least one conversation with Loayza about his comments that occurred shortly after Ms. Hertzberg's complaint; Loayza remembered this conversation, too, but believed that it occurred after Ms. Hertzberg's departure had become a fait accompli. Loayza apparently never was warned formally or disciplined for his comments, and, despite Ms. Hertzberg's repeated complaints to Margelos, the comments continued unabated until her departure from SRAM.

Ms. Hertzberg's employment with SRAM ended on February 6, 1995, although how it ended is not clear. Ms. Hertzberg testified that she was terminated from her employment by Lester because she was being "too disruptive." Id. at 55. Ms. Hertzberg's ex-husband and Whatmore both confirmed that Ms. Hertzberg had told them

that she was fired. Lester and Margelos, however, denied terminating Ms. Hertzberg. They testified that Ms. Hertzberg gave two weeks' notice. Shortly thereafter, she informed Lester that she was reconsidering. Margelos told Lester, however, that they were going to hold firm to her resignation.[2]

After leaving SRAM, Ms. Hertzberg wrote to SRAM's president, Stan Day. In the letter, she related her history of problems with Loayza, that she had voiced concerns about "certain procedures Manuel was using" and that she did not believe Loayza was a "team player." Def.'s Ex. 1. She also told Day that she had not intended to resign, but only had wanted her concerns addressed. She did not request any action from Day, but provided her number to him "if [he] would like to respond." *Id.* Ms. Hertzberg did not state that she had been the victim of sexual harassment, nor did she inform Day that her discharge was motivated by her harassment-related complaints.

During the time that Ms. Hertzberg was employed at SRAM, SRAM had in place a sexual harassment policy. The policy required that complaints be made through the chain of command, all the way to Day. Ms. Hertzberg had seen the employment manual containing the sexual harassment policy on only one occasion; she did not have a personal copy of the employment manual and, therefore, was not familiar with the requirements of the policy. Margelos testified that he was familiar with the policy and that the policy stated that SRAM did not tolerate sexual harassment. Lester had the same understanding of the policy. Neither individual, however, had received training in harassment issues or how to conduct a sexual harassment investigation.

**B. District Court Proceedings**

After pursuing her claims through administrative channels, Ms. Hertzberg filed a two-count complaint in

district court. In her complaint, Ms. Hertzberg first alleged that she had been sexually harassed by Loayza and Lester. The second count of her complaint alleged that SRAM had fired her in retaliation "for having opposed and complained about the hostile and offensive work environment." R.1 at 5. Ms. Hertzberg's complaint did not include a claim for discriminatory discharge, only retaliatory discharge. Ms. Hertzberg did not allege, either as part of count one or as a separate count, that she was constructively discharged -- that her working conditions were so intolerable that she was forced to resign. Ms. Hertzberg's claims proceeded to trial. After the close of Ms. Hertzberg's case, and again at the end of all of the evidence, SRAM moved for judgment as a matter of law on all aspects of Ms. Hertzberg's claims, including the availability of punitive damages. The district court reserved ruling on the motion. The jury then was instructed on Ms. Hertzberg's claims of sexual harassment and retaliatory discharge. These were the only two bases of recovery submitted to the jury. The jury returned a verdict for Ms. Hertzberg on the sexual harassment claim for which it awarded her $ 20,000 in punitive damages.[3] The jury, however, returned a verdict for SRAM on the retaliatory discharge claim.

Ms. Hertzberg then sought equitable relief from the district court in the form of back pay and front pay. She claimed that she was entitled to approximately $ 56,000 in back pay and ten years' front pay based on her actuary's testimony. Ms. Hertzberg did not file a supporting memorandum with the district court detailing why she was entitled to lost wages in the absence of a jury finding that she had endured a discriminatory discharge, actual or constructive.

In response, SRAM argued that back and front pay were available to Title VII plaintiffs only when they had proven discriminatory discharge. Because Ms. Hertzberg never had claimed that she was constructively discharged, and because

the jury rejected her retaliatory discharge claim, SRAM maintained that lost pay was not available to Ms. Hertzberg.[4]

The district court disagreed. It found that there was a "but for" relationship between Ms. Hertzberg's departure and the sexual harassment. Tr. of Dec. 16, 1999, at 9. Therefore, even though Ms. Hertzberg had not suffered a constructive discharge, she could still receive damages for lost pay.[5] Ruling on SRAM's motion for judgment as a matter of law, the district court also upheld the jury's punitive damages award. Consequently, it entered a final judgment of $66,829.18 in Ms. Hertzberg's favor; the sum represented $20,000 in punitive damages awarded by the jury, and $44,112.18 in back pay and $ 7,717 in front pay awarded by the court. SRAM timely appealed.

## II

## DISCUSSION

SRAM now seeks review of the district court's post-trial rulings. SRAM first submits that the district court should not have awarded back pay and front pay to Ms. Hertzberg. Second, SRAM contends that the district court erred in its calculation of the lost pay award. Finally, SRAM argues that the district court should not have left the jury's punitive damage award undisturbed.

### A. Lost Pay

SRAM maintains that the district court should not have awarded lost pay because Ms. Hertzberg did not plead or prove a cause of action that entitled her to back or front pay. Whether lost pay is available as a remedy for a statutory violation is a question of law that we review de novo. *See Selgas v. Am. Airlines, Inc., 104 F.3d 9, 12 (1st Cir. 1997)* ("Our review of the district court's decision that both front pay and reinstatement could be awarded together as part of

the remedies available to a Title VII plaintiff is de novo, as we review for legal error."). The district court's decision to award lost pay and the amount of that award, assuming statutory authorization, is reviewed only for an abuse of discretion. *See Downes v. Volkswagen of Am., Inc., 41 F.3d 1132, 1141 (7th Cir. 1994)* ("The statute also affords the court discretion to award front pay according to the circumstances of each case.").

In its decision to award lost pay, the district court acknowledged that it was bound by the jury's verdict on the retaliation claim. It also acknowledged that constructive discharge had not been submitted to the jury or proven. Nevertheless, it decided that back pay and front pay could be awarded because "but for" SRAM's harassment Ms. Hertzberg would not have left her employment. We believe that the district court's approach blurs the distinction between hostile work environment and constructive discharge cases, and between monetary damages and equitable relief.

It is well established that Title VII encompasses a cause of action for sexual harassment. We have held that a cause of action for sexual harassment arises when the conduct has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." *Wolf v. Northwest Ind. Symphony Soc'y, 250 F.3d 1136, 1143 (7th Cir. 2001)* (internal quotation marks and citations omitted). Further, the conduct at issue must be sufficiently severe or pervasive that a reasonable person would find it hostile and that the victim subjectively sees it as abusive. *See Murray v. Chicago Transit Auth., 252 F.3d 880, 889 (7th Cir. 2001).*[6]

In addition to defining actionable sexual harassment, our case law has distinguished "ordinary" sexual harassment from "aggravated" sexual harassment. *Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 677 (7th Cir. 1993).* In the "ordinary" case, the employer engages in or condones

hostile conduct that interferes with the employee's ability to perform his or her job. *See Wolf, 250 F.3d at 1143.* In such circumstances the employee "is expected to remain on the job while seeking redress" of the harassment. *Id.* (internal quotation marks and citations omitted). In the "aggravated" case, the employer not only interferes with the employee's performance, but "'*makes* an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'" *Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 536-37 (7th Cir. 1993)* (quoting *Weihaupt v. Am. Med. Ass'n, 874 F.2d 419, 426 (7th Cir. 1989)* (emphasis in original)). When working conditions reach these depths, an employee need not remain on the job, but may resign and seek his or her remedies in court. *See Chambers v. Am. Trans Air, Inc., 17 F.3d 998, 1005 (7th Cir. 1994)* ("Thus, courts have said that where conditions are so intolerable that a reasonable person would feel compelled to resign, a plaintiff may do that, and then sue for reinstatement and back pay.").

The distinction between "ordinary" and "aggravated" harassment is not one merely of semantics; whether harassment is ordinary or aggravated affects the damages available to the plaintiff. A brief history of damages under Title VII is helpful in understanding this distinction. Before Congress enacted the Civil Rights Act of 1991 ("the 1991 Act"), Title VII allowed for only equitable remedies, such as reinstatement, back pay in lieu of reinstatement and injunctive relief.[7] In response to this limitation, courts developed the constructive discharge doctrine. *See Chambers, 17 F.3d at 1005.* "Thus, courts . . . said that where conditions are so intolerable that a reasonable person would feel compelled to resign, a plaintiff may do that, and then sue for reinstatement and back pay." *Id.* However, the constructive discharge doctrine did not assist those whose working conditions were unreasonable, but not intolerable. Indeed, one congressional report noted that "back pay as the exclusive monetary remedy under Title VII has not served as

an effective deterrent, and, when back pay is not available, as in the case where a discrimination victim remains on-the-job or leaves the workplace for reasons other than discrimination, there is simply no deterrent." H.R. Rep. No. 102-40 (I), at 154 (1991). Consequently, in the 1991 Act, Congress expanded the types of remedies available to Title VII plaintiffs to compensate those left unaided by the original statute. *See* H.R. Rep. 102-40 (II), at § 8 (1991) (establishing the need for expanded remedies in light of the examples of women who were severely harassed but received little or no relief).

The new damage provisions of the 1991 Act are codified at *42 U.S.C. § 1981a,* which states:

> In an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [ *42 U.S.C. § 2000e-5*(g)], from the respondent.

*42 U.S.C. § 1981a*(a)(1). In adopting this language, "Congress sought to expand the available remedies by permitting the recovery of compensatory and punitive damages in addition to previously available remedies, such as front pay." *Pollard v. E.I. du Pont de Nemours & Co., 150 L. Ed. 2d 62, 121 S. Ct. 1946, 1952 (2001).* Thus, the 1991 Civil Rights Act addressed the disparity in treatment by providing additional remedies; it left undisturbed the equitable remedies available under Title VII. Indeed, Congress explicitly

provided that the new remedy provisions did not subsume the old Title VII remedies. *See 42 U.S.C. § 1981a*(b)(2). Section 1981a (b)(2) states: "Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." *42 U.S.C. § 1981a* (b)(2).

More important for our purposes, the 1991 Act also left undisturbed the showing that a plaintiff must make to obtain equitable relief: A victim of discrimination that leaves his or her employment as a result of the discrimination must show either an actual or constructive discharge in order to receive the equitable remedy of reinstatement, or back and front pay in lieu of reinstatement. In the absence of such a showing, a plaintiff's exclusive remedies are those set forth in *42 U.S.C. § 1981a.*

We are not alone in reaching this conclusion. Two circuits that have faced this issue have held that back pay and front pay may not be recovered in the absence of a finding of discriminatory discharge. *See Mallinson-Montague v. Pocrnick, 224 F.3d 1224 (10th Cir. 2000); Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216 (8th Cir. 1997).* In *Pocrnick,* a district court had rejected the plaintiffs' plea for front and back pay following a jury's determination that they had not suffered constructive discharges. See *224 F.3d at 1226.* The plaintiffs cross-appealed on this basis, but the Tenth Circuit stated:

> Because the remedies available under § 1981a do not displace or alter the remedies available under pre-1991 Title VII law, but instead merely supplement those remedies, and because § 1981a(b)(2) specifically precludes the award of back pay as part of the new compensatory remedies provided therein, the district court concluded that "there is

> nothing in the 1991 Amendments to suggest that the case law applying those prior remedies is abrogated. Instead, it appears that those prior remedies, and the case law applying those remedies remain intact." Accordingly, the district court further concluded that the Plaintiffs' entitlement to back pay was controlled exclusively by § 2000e-5(g) and the case law interpreting it and not by the separate, supplemental remedies set out in § 1981a.

*224 F.3d at 1237* (footnotes omitted). The appellate court adopted this reasoning and upheld the judgment.

The Eighth Circuit held similarly in *Caviness.* There, the jury had awarded the plaintiff $ 51,000 in damages on her sexual harassment claim. The defendant argued that the award must be vacated because the actions occurred pre-1991 and, therefore, only equitable remedies were available to the plaintiff. The district court recognized that the plain tiff was limited to pre-1991 Act remedies; nevertheless, it upheld the award and recharacterized it as back pay. The defendant appealed, and the Eighth Circuit reversed. In resolving the issue, the court first noted that "the recovery of monetary damages by successful plaintiffs on claims of discrimination under Title VII before the 1991 Act was limited to equitable forms of relief, such as back pay, and the circumstances under which such monetary equitable relief was available were likewise limited." *Id.* at 1219. Consequently, even

> "if unlawful discrimination was proved, under prior [pre-November 1991] law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's

> employment status, such as a denied promotion, a differential in compensation, or termination." Sexual harassment occurring before November 1991 ordinarily does not have the sort of concrete economic effect required for the recovery of money damages under Title VII. The exception would be sexual harassment that resulted in constructive discharge . . . . In that case, back pay (and front pay) would be potential remedies. But in the absence of constructive discharge, a plaintiff subjected to sexual harassment, no matter how egregious, is not "made whole" by the equitable remedy of back pay.

*Id.* (quoting *Landgraf v. USI Film Prods., 511 U.S. 244, 254, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994))* (alteration in original). Because, the plaintiff had not alleged constructive discharge, and because no other theory of discriminatory discharge was submitted to the jury, the Eighth Circuit reversed the back pay award. *See id.*[8]

The requirement that a plaintiff establish a discriminatory discharge in order to receive lost pay precludes such a recovery for Ms. Hertzberg in the present case. We agree with the district court that Ms. Hertzberg's lawyers, "in the nature of their presentation, may have shot themselves or their client in the foot on the retaliation claim by the instruction that limited adverse employment action to a termination of plaintiff's employment by defendant," Tr. of Dec. 16, 1999, at 6-7; that is, Ms. Hertzberg may well have convinced a jury that she had been constructively discharged. However, Ms. Hertzberg presented only two bases of relief to the jury: sexual harassment and retaliatory discharge. The jury rejected Ms. Hertzberg's retaliatory discharge claim. Consequently, there was no discriminatory discharge on

which the award of lost pay could be based, and we must reverse the lost pay award.

**B. Punitive Damages**

SRAM also contends that the district court erred when it failed to grant SRAM's motion for judgment as a matter of law on Ms. Hertzberg's punitive damage claim. We review the denial of a motion for judgment as a matter of law de novo. *See Emmel v. Coca-Cola Bottling Co., 95 F.3d 627, 629 (7th Cir. 1996).* In addressing the issue, we ask "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed," here, Ms. Hertzberg. *Tapia v. City of Greenwood, 965 F.2d 336, 338 (7th Cir. 1992).*

SRAM first argues that Ms. Hertzberg did not suffer severe sexual harassment. SRAM also maintains that nothing in the record suggests that SRAM's management knew that its actions with respect to Ms. Hertzberg might violate federal law. Finally, SRAM contends that punitive damages should be foreclosed to Ms. Hertzberg because she did not utilize her last avenue of redress under SRAM's harassment policy -- an appeal to SRAM's president. Consequently, SRAM believes, Ms. Hertzberg cannot establish punitive damages as a matter of law.

We believe these arguments must be rejected in the wake of *Kolstad v. American Dental Association, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999).* In *Kolstad,* the Supreme Court set forth the elements that a plaintiff must establish in order to receive punitive damages under the 1991 Act. According to the statute, stated the Court, the employer must act with malice or reckless indifference to the plaintiff's federally protected rights. "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may

be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad, 527 U.S. at 535.* Restating the standard in a slightly different formulation, the Court held: "An employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id. at 536.* Consequently, although the egregiousness of the conduct might support an inference that the employer acted with the requisite state of mind, a showing of egregiousness is not an independent requirement of a punitive damages award. *See id. at 537-38.*

This court applied the Kolstad standard in *Bruso v. United Airlines, Inc., 239 F.3d 848 (7th Cir. 2001).* In *Bruso,* we discussed *Kolstad's* "three-part framework for determining whether an award of punitive damages is proper under the statutory standard." *239 F.3d at 857.* The first step requires the plaintiff to "demonstrate that the employer acted with the requisite mental state." *Id.* However, we continued,

> the employer need not be aware that it is engaging in discrimination. Instead, it need only act in the face of a perceived risk that its actions will violate federal law. A plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer's policies for implementing those laws.

*Id. at 857-58* (internal quotation marks and citations omitted).[9] Once the plaintiff has met this burden, the plaintiff "must demonstrate that the employees who discriminated against him are managerial agents acting within the scope of their employment." *Id.* However, even if the plaintiff meets these burdens, "the employer may avoid liability for punitive

damages if it can show that it engaged in good faith efforts to implement an antidiscrimination policy." *Id.*

We believe that the evidence, together with the reasonable inferences that the jury was entitled to draw from that evidence, were sufficient to allow a jury to resolve these issues in favor of Ms. Hertzberg. With respect to the first element, there was evidence that both Lester and Margelos "knew of . . . the antidiscrimination laws and the employer's policies for implementing those laws." *Id. at 858.* Specifically, Lester testified that SRAM had a sexual harassment policy and, although he could not remember the specifics of the policy, he believed it required an investigation and an attempt to reach a resolution between the parties. Furthermore, when asked about his response to Ms. Hertzberg's complaint about Loayza, Mr. Lester replied: "I spoke with Manuel. I told him that Julie thought his jokes were inappropriate and so did I. And that he should stop doing that immediately. It was incorrect behavior in the workplace." R.68 at 119. Consequently, Lester's knowledge of the existence of SRAM's policy is undisputed. Furthermore, a jury reasonably could infer from Lester's statements to Loayza that Loayza's comments were "inappropriate" and "incorrect" because they were illegal. *See Alexander v. Fulton County, 207 F.3d 1303, 1338 n.28 (11th Cir. 2000)* (holding that sheriff's testimony that he "would never assert" that it was "okay to fire someone because of their race" was sufficient to establish that he acted with the requisite mental state); *cf. Ogden v. Wave Works, Inc., 214 F.3d 999, 1010 (8th Cir. 2000)* (holding that the combination of familiarity with company policy and training in harassment issues was sufficient evidence from which a jury could conclude that a managerial employee acted in the face of a perceived risk that his actions violated federal law).

The same is true of Margelos. When asked about SRAM's policy on sexual harassment, Margelos responded: "Well, certainly it's not tolerated. If we're made aware of any issues,

we would address them immediately." R.68 at 248. Furthermore, when detailing his discussions with Lester regarding Lester's touching Ms. Hertzberg, Margelos stated:

> I told Brian [Lester] exactly what Julie [Hertzberg] and Dee [Whatmore] had told me. And that Julie felt that it was inappropriate. I told Brian, you know, that kind of behavior, regardless of what, you know, might be just incidental contact or whatever can be misinterpreted by other people and it's very offensive.

R.68 at 256. Margelos, therefore, like Lester, expressly testified to knowledge of SRAM's policy. Furthermore, like Lester, the jury reasonably could conclude that Margelos understood that certain conduct that was "inappropriate" or "offensive" might be illegal. *See Alexander, 207 F.3d at 1338.* Consequently, we do not believe that we can reverse the jury's verdict of punitive damages with respect to Ms. Hertzberg's showing on this first element.

As stated above, however, our inquiry does not end here. Ms. Hertzberg also must show that either Lester or Margelos was a "managerial agent . . . acting within the scope of [his] employment." *Bruso, 239 F.3d at 858.* This is "necessarily a fact-intensive inquiry" driven by "the kind of authority the employer has given the employee, the amount of discretion given to the employee in executing his job duties, and the manner in which those duties are carried out." *Id.*

Although the evidence in the record concerning Lester is sparse, it does not appear from the evidence that Lester's responsibilities rendered him a managerial agent. There is little evidence in the record concerning Lester's day-to-day authority in overseeing the shipping department. However, there was testimony from both Lester and Margelos that

Lester had little discretion in hiring, disciplining or terminating employees that reported to him. According to Lester, he had only a "small amount" of input in hiring those who would work under him. R.68 at 116. Furthermore, Lester had no power to terminate employees without Margelos' approval. Because the little evidence presented suggests that Lester's authority and discretion was limited, we do not believe a jury reasonably could conclude that Lester was SRAM's managerial agent. *Cf. Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 447 (4th Cir. 2000)* (holding that a supervisor was a managerial agent because she "had the authority to make personnel decisions . . . without guidelines or review, and thus was able to make personnel decisions without any objective criteria or accountability"), *cert. denied, 531 U.S. 822, 121 S. Ct. 66, 148 L. Ed. 2d 31 (2000); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1247 (10th Cir. 1999)* (holding that employees with the ability to suspend, hire and fire subordinates occupied management positions for purposes of imposing punitive damages).

We cannot reach the same conclusion with respect to Margelos. Margelos was plant manager at the Elk Grove Village facility and "general manager for [SRAM's] U.S. operations." R.68 at 243. He hired the staff for the Elk Grove Village plant, he took care of personnel issues and he had the authority to discipline and terminate the employment of those who worked for him, directly or indirectly. We believe this evidence provides a sufficient basis from which a jury could conclude that Margelos was SRAM's "managerial agent acting within the scope of [his] employment" for purposes of addressing Ms. Hertzberg's complaints about Loayza. *Bruso, 239 F.3d at 858.*

The issue then becomes whether a reasonable jury could conclude that SRAM failed to make "good faith efforts to implement an antidiscrimination policy." *Id.* "Although the implementation of a written or formal antidiscrimination policy is relevant to evaluating an employer's good faith

efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award." *Id. at 858.* Taken in the light most favorable to Ms. Hertzberg, the evidence establishes a lack of a good faith effort to insulate Ms. Hertzberg from Loayza's harassment. The testimony of Lester and Margelos established that Ms. Hertzberg complained about Loayza's gender-based harassment. *See* R.68 at 119 (testimony of Lester that he "recalled that Julie said that Manuel was making jokes about women"); *id.* at 278 (testimony of Margelos characterizing Hertzberg's complaints as concerning Loayza's "demeaning and patronizing" attitude). Furthermore, Ms. Hertzberg testified that Loayza would make gender-related comments to her constantly -- "at least over 100 times" during the course of her four-month employment. *Id.* at 62. When Ms. Hertzberg reported these incidents to Lester, she was told she was being "too emotional." *Id.* at 34. When she proceeded through the chain of command and went to Margelos, he "seemed to shrug it off," *id.* at 54; indeed, both managers were ineffective in addressing the problem because Loayza's badgering did not stop. *See Bruso, 239 F.3d at 861* (finding this element of *Kolstad* met because Bruso introduced evidence at trial that suggested that United's top management officials disregarded its zero-tolerance policy by turning a blind eye to the harassment that they knew was occurring); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999)* (considering management's failure to respond effectively to complaints as evidence of lack of good faith).[10] There also was evidence that Margelos failed to follow SRAM's procedure for receiving complaints because he did not put them in writing. Finally, although SRAM argues that Ms. Hertzberg did not make an appeal to the company president (as allowed by its policy), there is evidence in the record that SRAM did not provide its employees ready access to its sexual harassment policy, nor did a management employee inform Ms. Hertzberg of this avenue of redress. *Cf. Faragher v. City of Boca Raton, 524*

*U.S. 775, 809, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)* (holding that city could not establish affirmative defense to sexual harassment complaint -- that it took reasonable care to prevent and correct harassing behavior -- in light of "complete failure" to promulgate sexual harassment policy).

Given the constant nature of the harassment and SRAM's lack of managerial response to the problem, we believe a jury was entitled to conclude that SRAM did not make good faith efforts to implement its sexual harassment policy. Consequently, because a reasonable jury could have found that Ms. Hertzberg met her burden with respect to punitive damages, we shall not disturb its verdict.

**Conclusion**

For the foregoing reasons, we reverse that portion of the district court's judgment awarding front and back pay, and we affirm the judgment with respect to the award of punitive damages. The parties shall bear their own costs in this court.

AFFIRMED IN PART; REVERSED IN PART

Footnotes

[1] Lester, who also was Loayza's immediate supervisor, testified that he recalled only one complaint from Ms. Hertzberg, that he spoke to Loayza and that he told Loayza that the comments were inappropriate.

[2] At some point after Ms. Hertzberg resigned, SRAM made the decision simply to pay Ms. Hertzberg her remaining salary without having her finish out her last two weeks.

[3] Compensatory damages were foreclosed to Ms. Hertzberg as a result of her discovery responses. During discovery, SRAM queried Ms. Hertzberg concerning her damages from the alleged harassment. In response to a discovery request, Ms. Hertzberg itemized only lost wages as her damages. SRAM also asked Ms. Hertzberg at her deposition about her damages. Ms. Hertzberg responded that she only had lost pay damages. These responses prompted SRAM to file a motion in limine to preclude Ms. Hertzberg from introducing any evidence at trial concerning compensatory damages for emotional distress. Relying on Ms. Hertzberg's discovery responses, the district court granted SRAM's motion in limine. Consequently, the issue of compensatory damages was not submitted to the jury. The fact that Ms. Hertzberg did not recover compensatory damages does not affect the jury's award of punitive damages. *See Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir. 1998)* (holding that there was "no legal flaw" in a jury's award of punitive damages in the absence of a compensatory damage award).

[4] SRAM also took issue with the amount of lost wages Ms. Hertzberg claimed. According to SRAM, the testimony of Ms. Hertzberg's actuary rested on the faulty assumption that she would have worked ten hours of overtime per week for ten years. Furthermore, SRAM objected to any back or front pay that extended beyond May 1998, the time when

SRAM's Elk Grove Village facility closed.

[5] Additionally, the district court rejected many of SRAM's arguments regarding the speculative nature of an extended front pay award. The court stated: "Finally, SRAM's several objections to the quantification of that lost income recovery do not rise above the level of captiousness. For one thing, it was SRAM's misconduct that created any difficulty in proving such damages with precision." R.57 at 5.

[6] "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993).*

[7] *See Tobey v. Extel/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993)* ("Although sexual harassment is a form of sex discrimination forbidden by Title VII, damages are not available under that statute for sexual harassment as such -- because Title VII is not a damages statute.") (citations omitted); *King v. Bd. of Regents of the Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990)* ("Compensatory, nominal, and punitive damages are not available under Title VII.").

[8] Some circuits have crafted a narrow exception to this general rule for failure-to-promote cases. In a failure to promote case, a plaintiff may seek back pay for periods beyond the employee's voluntary resignation "when the employee was preparing to enter an entirely different career with the same employer." *Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1495 (9th Cir. 1995)* (internal quotation marks and citations omitted). In *Odima,* the court stated:

> An employee who has been discriminatorily denied an opportunity for a promotion ordinarily may not collect backpay for periods

> beyond that employee's voluntary resignation unless the employee demonstrates that she was constructively discharged by the employer. That doctrine does not apply, however, when the employee was preparing to enter an entirely different career with the same employer.

*Id.* In these cases, "an employer's discriminatory denial of the employee's opportunity to enter an entirely different career constitutes a refusal to hire; thus, the limitation on backpay in promotion cases does not apply." *Id.; cf. Wells v. North Carolina Bd. of Alcohol Control, 714 F.2d 340, 342 (4th Cir. 1983)* (holding that back pay was available to stock clerk who, but for the company's discrimination, would have been promoted to a sales clerk position and consequently would not have suffered a back injury that resulted in his leaving his stock clerk position). Ms. Hertzberg, however, has made no claim for failure to promote. Consequently, even if we were to adopt our colleagues' reasoning, the exception is inapplicable to the case now before us.

[9] Another way a plaintiff may meet this burden is "by showing that the defendant's employees lied, either to the plaintiff or to the jury, in order to cover up their discriminatory actions." *Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2001).*

[10] Although Margelos and Lester testified that they spoke with Loayza, and that Ms. Hertzberg reported no further complaints (indeed, that she had told them that the situation was improving), the jury was entitled to credit Ms. Hertzberg's version of events. *See, e.g., Europlast, Ltd. v. Oak Switch Sys., Inc., 10 F.3d 1266, 1275 (7th Cir. 1993)* (allowing that a jury may credit the testimony of one witness over another).

No. 96 C 6944

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

JULIE K. HERTZBERG, Plaintiff,

v.

SRAM CORPORATION, Defendant.

January 31, 2000, Decided

February 1, 2000, Docketed

**COUNSEL:**
For JULIE K HERTZBERG, plaintiff: Candace H Gorman, Law Office of H. Candace Gorman, Chicago, IL.

For JULIE K HERTZBERG, plaintiff: Suzanne McCarthy, Attorney at Law, Chicago, IL.

For SRAM CORPORATION, defendant: David Brian Ritter, Janet M. Kyte, Altheimer & Gray, Chicago, IL.

For SRAM CORPORATION, defendant: Neal F. Perryman, Robert J. Golterman, Lewis, Rice & Fingersh, St. Louis, MO.

**JUDGES:**
Milton I. Shadur, Senior United States District Judge.

**OPINION BY:**
Milton I. Shadur

**OPINION:**

MEMORANDUM

At this point the parties have (at last) completed their submissions that are intended to enable this Court to make the equitable determination of back pay and front pay to be awarded to plaintiff Julie Hertzberg ("Hertzberg") in consequence of the jury verdict that was rendered in her favor and against defendant SRAM Corporation ("SRAM") on her claim of sexual harassment (the jury having awarded Hertzberg $ 20,000 in punitive damages in that respect). As this Court has already ruled orally, a portion of SRAM's numerous conceptually unsound submissions during the course of this litigation--in this instance, opposing any backpay or frontpay award at all--is premised on the fallacious assertion that the case was not tried by Hertzberg on a constructive discharge theory.

That is really a red herring. Here the obvious reality is that Hertzberg's statement that she was not prepared to remain at SRAM unless her sexual harassment grievance were to be addressed satisfactorily flowed directly from the harassment itself, the existence of which has been confirmed by the jury verdict. And when Hertzberg almost immediately asked SRAM to reconsider its treatment of her statement to that effect as the equivalent of her having quit her job, her request was refused by SRAM without any reason other than that it would not entertain any such reconsideration. As this Court has previously ruled, under those circumstances the necessary proximate causal connection links up the jury-confirmed sexual harassment with the adverse employment action of Hertzberg's loss of employment at SRAM.

This memorandum will not dwell further on the deficiencies in SRAM's presentations, except to point out in what follows the instances where this Court's damage determinations are based on what will be referred to in

shorthand terms as the "Second Premise." By the same token, what follows will also reflect any deficiencies in Hertzberg's submissions by what will be characterized as the "First Premise." By way of explanation, the "First Premise" is that the burden of proof on damages by a preponderance of the evidence generally rests on Hertzberg. By way of limitation of the "First Premise," the "Second Premise" is the familiar doctrine that goes as far back, in this Court's recollection, as the holding in *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65, 90 L. Ed. 652, 66 S. Ct. 574 (1946)* that where it is a defendant's wrongdoing that makes plaintiff's precise proof of damages more difficult, the risk of any uncertainty in calculation must be borne by the defendant wrongdoer and not the plaintiff victim.[1]

To turn to the components of the award of back pay and front pay, Hertzberg's counsel have represented that they have the damage calculations computerized in such manner that they can swiftly plug in any replacement numbers to produce a bottom line result. This Court will therefore not take on the onerous burden (which is really the responsibility of prevailing counsel) of converting the substantive determinations that are reflected here into the actual numbers needed for the entry of judgment. And because this Court perceives the delay in responding with the necessary grist for the damages mill to be primarily (though certainly not exclusively) that of Hertzberg's counsel (who, representing the prevailing party, have the laboring oar), and because of this Court's desire to maximize the incentive for swift resolution by the actual entry of judgment, prejudgment interest will be allowed only to February 1, 2000.

This memorandum will refer to the just-received Joint Statement (Amended) of Agreed and Disputed Facts and Assumptions Pertaining to Front and Back Pay simply as "Joint Statement." And in that regard, the Hertzberg tables attached to the Joint Statement are plainly in error because they treat each month as comprising exactly four weeks--

essentially creating a 48-week year. That of course is wrong: Months average out to 4-1/3 weeks.

What is set out here therefore reflects this Court's determinations, to be converted by Hertzberg's counsel into calculations based on the weeks involved, as to the components that enter into quantifying Hertzberg's recoverable back pay (including any overtime) and front pay, stemming from the fact that Hertzberg's weekly compensation at SRAM at the time of her termination was $ 791.30 (40 hours at $ 10.75 per hour plus 10 hours at $ 16.13 per hour):

1. Period of Hertzberg's unemployment (February 17 to March 30, 1995): 6.6 weeks at $ 791.30 per week.

2. Initial period of Hertzberg's 30-hour work week at Land Planning Services ("LPS") (March 30 to April 14, 1995): 2.4 weeks at $ 491.30 per week ($ 791.30 less $ 300 [30 hours at $ 10 per hour]).

3. Period of Hertzberg's 35-hour work weeks at LPS (April 17, 1995 to July 12, 1996[2]): xxxx weeks[3] at $ 441.30 per week ($ 791.30 less $ 350).

4. Next period of Hertzberg's 30-hour work weeks at LPS (September 8, 1996 through December 1997[4]): xxxx weeks at $ 146.50 per week.[5]

5. Continued period of Hertzberg's 30-hour work weeks at LPS (January through July 1998): xxxx weeks at $ 156.50 per week.[6]

6. Beginning period of Hertzberg's 40-hour work weeks at LPS (August through December 1998): xxxx weeks at $ 36 per week.[7]

7. Continued Hertzberg 40-hour work weeks at LPS for all of 1999: 52 weeks at $ 38.80 per week.[8]

As for front pay, the uncontroverted testimony during trial as to the continued availability of comparable employment at SRAM's local headquarters after the Elk Grove facility was closed calls for the rejection of SRAM's stonewall position that no such award is called for. Nor has SRAM offered anything to indicate why that should no longer continue to be the case, again bringing into play the Second Premise.

Hence Hertzberg's prayer for a five-year frontpay award, which this Court might otherwise perhaps deem to be speculative in light of her short-term employment by SRAM, is accepted as reasonable in light of (1) the absence of any suggested predicate for a lack of such continuity in Hertzberg's employment, other than the sexual harassment of which she was the victim, (2) Hertzberg's knowledgeable background and interest in the field of SRAM's business and (3) Hertzberg's youthfulness, such that no departure from the workforce for that or any other reason presents itself as a possibility. And as for the pay differential for the five-year frontpay period, the same ratio of $ 10.75 (the SRAM hourly rate at Hertzberg's termination) to $ 10.00 (Hertzberg's starting rate of pay at LPS) should be continued throughout, but it will be applied to presumed future annual increases at the same annual compound interest rate that would equate to Hertzberg's having received an aggregate increase from $ 10 to $ 12.90 in her initial 3-3/4 year period of employment at LPS.[9]

Finally, because the reality is that Hertzberg will not have received her damages award ratably over the years to which the lost income was and will be attributable, but will rather obtain her recovery in a lump sum in the current year, the calculation of the impact on FICA and Social Security

benefits must be made in terms of that reality--rather than the false premise that the amounts should be attributed to the years in which the damages were incurred and will continue to be incurred. Because that is also a matter of plugging in the appropriate numbers, Hertzberg's counsel will be responsible for submitting those revised calculations as well.

As stated earlier, this Court looks forward to the swiftest possible submission of the revised figures by Hertzberg's counsel (remembering again that prejudgment interest will run only to February 1, 2000). Absent any objection by SRAM's counsel based on the accuracy of the calculations (and not on any disagreement with the principles reflected in this memorandum) within two working days after that submission, this Court will cause a judgment to be entered promptly.

Milton I. Shadur

Senior United States District Judge

Date: January 31, 2000

Footnotes

[1] One of Hertzberg's memoranda points even farther back, to *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-64, 75 L. Ed. 544, 51 S. Ct. 248 (1931).*

[2] This stopping point takes account of the fact that Hertzberg did not work during the period from July 12 to September 8, 1996 because of the birth of her daughter.

[3] From here on out this Court has not calculated the specific number of weeks involved in the various periods. That will be left to Hertzberg's counsel's computerized calculations.

[4] This reference to 30-hour work weeks is not simply a matter of claimed waiver on SRAM's part. On the record, Hertzberg's testimony as to such a reduction in her weekly hours at LPS was uncontroverted--and this conclusion is further buttressed by the Second Premise.

[5] This, like all further determinations, reflects a differential based on the assumption that Hertzberg's base pay at SRAM would have increased from time to time in the same percentages as her base pay at LPS, a reasonable assumption on its own that is also bolstered substantially by the Second Premise. In this instance that would have involved a 12.5% increase from the original SRAM base pay of $ 10.75 to a new base pay of $ 12.10, with no SRAM overtime being taken into account from here on out. So Hertzberg's presumed lost SRAM weekly compensation for a 40-hour week would be $ 484, a figure to be reduced by the actual LPS pay of $ 337.50.

[6] This differential is arrived at on the comparable assumption (see n.5) that Hertzberg's base pay at SRAM would have increased to $ 12.95 per hour (a 20.5% increase over Hertzberg's SRAM base pay at the time of her termination), or $ 518 for a 40-hour week, with her

corresponding actual weekly pay at LPS being $ 361.50 (30 hours at $ 12.05 per hour).

[7] Here the same assumed $ 518 weekly pay at SRAM (see n.6) exceeds by only the much smaller $ 36 figure, as referred to in the text, Hertzberg's actual weekly pay of $ 482 at LPS (40 hours at $ 12. 05 per hour).

[8] With Hertzberg's compensation at LPS having risen to $ 12.90 per hour, or $ 516 per week (an increase of 29% over her starting pay rate of $ 10), an assumed corresponding 29% increase over Hertzberg's $ 10.75 base pay scale at SRAM would have come to $ 13.87 per hour, or $ 554.80 for the 40-hour work week.

[9] That compound interest rate is readily calculable.

No. 96 C 6944

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

JULIE K. HERTZBERG,
Plaintiff,

v.

SRAM CORPORATION,
Defendant.

Docketed March 3, 2000

MEMORANDUM ORDER

SRAM Corporation ("SRAM") *has* tendered a Motion for Judgment as a Matter of Law and To Reconsider Lost Pay Award, coupled with a supporting brief (cited "Mem.–"), both to be presented on March 2, 2000. For the reasons briefly stated here, the Motion is granted to the limited extent to which *SRAM's* counsel--in the best professional tradition—-have pointed out an error in calculation that would otherwise have benefited their client, but the Motion is denied in all other respects.

As to the first item, the Motion accurately points out a clerical error (correctible under Fed. R. Civ. P. ("Rule") 60(a)) in this Court's addition of the several components making up the judgment in favor of Julie Hertzberg ("Hertzberg") and against SRAM: Instead of $66,829.18 as reflected in the February 10 Judgment Order, the total should be $71,829.18.[1] That being the *case,* the Judgment

Order is amended *so* that the first sentence of its final paragraph reads:

> Accordingly final judgment is ordered to be entered in favor of Julie Hertzberg and against SRAM Corporation in the aggregate sum of $71,829.18.

As for the rest, however, the Motion fails. Its several aspects may be dealt with quite briefly.

First, as to the jury's award of punitive damages, SRAM itself characterizes the conduct to which Hertzberg was subjected as "very close to the (admittedly amorphous) line between actual sexual harassment and non-actionable offensive conduct" (Mem. 4) Even were that so (and that of course reflects *SRAM's* self-evaluation, scarcely that of an unbiased source), the resolution of which side of the line the conduct occupied--importantly, including the question of *SRAM's* intention--would have presented a classic situation for jury resolution. It was well within the jury's province, having heard the testimony, to make the necessary credibility determinations (which are solely the jury's prerogative) and to find that *SRAM's* failure to respond appropriately to the complained-of conduct reflected its "malice or reckless indifference" to Hertzberg's rights to an extent that was sufficient to support a punitive damages award. That facet of the SPAM Motion is denied.

As to the lost pay award, SRAM builds its Motion on a false foundation. It speaks of "the jury's conclusion that Plaintiff's discharge was not unlawful" (Mem. 5) and goes on to *say* that Hertzberg's "potential entitlement to back pay was extinguished when the jury found that her discharge from SRAM *was* valid and not unlawful" (id.). That, however, mischaracterizes the record. Here is the portion of the jury

instructions (part of *SRAM's* Instruction No. 1) that described Hertzberg's claim on which the jury ultimately ruled against her and in SRAM's favor:

> In addition, it is unlawful under Title VII for an employer to terminate an employee for complaining about sexual harassment. Plaintiff claims that her employment with Defendant was terminated because of her complaints about sexual harassment. Defendant also denies this claim.

And attached to this memorandum order as Ex. 2 is the instruction that set out the elements Hertzberg was required to prove to prevail on that claim. That instruction, though labeled "Court's Instruction No. 17," was drawn from Hertzberg's proposed Instruction 12 and SRAM's proposed Instructions 4 and 5, all of which spoke of "adverse employment action" in terms of "termination of employment."

There is of course no way to determine precisely which one or more of the elements of Hertzberg's unlawful retaliation claim the jury found she had failed to establish. Nor is that answer definitively provided by any necessary inferences from the jury's question on that score or from this Court's response to that question (which, as always, was decided upon after conferring with counsel for both parties). But it is fair to conclude that the jury decided that what might reasonably be viewed *as* Hertzberg's termination under either side's scenario--that *is,* SRAM's refusal to permit Hertzberg to withdraw her resignation or her stated intention to resign--was not in retaliation for her complaints of sexual harassment. That after all is clearly the effect of the jury's verdict on Hertzberg's unlawful retaliation claim.

That however was not the question that this Court, as contrasted with the jury, was called on to resolve. Remember that it is for this Court and not the jury to have decided on the recoverable compensatory damages stemming from SRAM's unlawful *sexual* harassment, which the jury did find to have occurred (in that respect, *see* the attached transcript of this Court's oral ruling of December 16, 1999). And in that regard, this Court's December 16 oral ruling also expressed the basis on which Hertzberg's lost income is a proper component of her damages on her proved sexual harassment claim, rather than being negated by the adverse jury verdict on the unlawful retaliation claim.[2]

Finally, *SRAM's* several objections to the quantification of that lost income recovery do not rise above the level of captiousness. For one thing, it was SRAM's misconduct that created any difficulty in proving such damages with precision. If anything, this Court's calculations were more generous to SRAM, rather than less so, in using Hertzberg's new employment *as* the yardstick for what should have been her continued employment at SRAM. After all, Hertzberg's background with bicycles would *most* reasonably have been expected to create greater incremental enhancements of her value to SRAM than were recognized by the raises that she earned in her new employment--in what SRAM correctly identifies as "a different industry altogether" (Mem. 7). And there is surely nothing unreasonable in accepting the notion that but for the unlawful sexual harassment, Hertzberg's employment at SRAM would have continued for the long term, as this Court's January 31, 2000 memorandum spoke of.

## Conclusion

It should be unnecessary to repeat analyses that this Court has already articulated in response to earlier objections that are largely repeated in SRAM's current Motion. As

stated earlier, the Motion is denied in all respects save one---correction of the clerical error referred to at the outset.

Milton I. Shadur

Senior United *States* District Judge
Date: March 2, 2000

## COMPRISE CAN SURPRISE

*Comprise* **means** ***"to*** contain or embrace." A unit comprises, or "is made up of" the elements of which it is composed. The elements, on the other hand, constitute, or "make up," the unit: "The estate *comprises* a manor house, two guest houses, and a stable." "The book *cornprises* five chapters and a bibliograph."

Unfortunately, considering how often it is improperly employed, *comprise* seems to thrive on misuse. For example, "Many counties comprise the state of Ohio" needs correcting, for it is the state of Ohio that comprises many counties. "He listed the elements that comprise the crime" is not right either. The crime comprises the elements.

Whenever doubtful about the correct use of *comprise,* the safest move is to replace it with "consists of" or "be composed of" which is what *comprise* means: "The estate consists of. . . ." "The book is composed of. . . . Even avoiding ***comprise*** entirely would be no loss. It is such a starchy word that something simpler, the word *has,* for example, would be a welcome relief: "The state of Ohio has (instead of *comprises)* many counties." But because the whole comprises the parts, the passive voice "is comprised of" may not be used.

*One caveat:* ***Include*** is not a precise synonym for *cornprise* despite such a listing by some dictionaries. What follows *comprise* is a complete list; what follows *inctud2* is, or should be, only a partial one. For instance, "The book includes five chapters, a bibliography, and an index of subjects" means that the book has more than the sections mentioned. if *comprise* were the verb, the sentence would mean that the book contained only those segments, and nothing more. With *include,* more is to come; with *comprise,* all has been said.

Your verdict must be for Plaintiff and against Defendant on Plaintiffs claim of unlawful retaliation if Plaintiff proves all of the following essential elements by a preponderance of the evidence:

*First,* Plaintiff engaged in protected expression; and

*Second,* Plaintiff suffered an adverse employment action by Defendant; and

*Third,* there was a causal link between the protected expression and the adverse employment suffered by Plaintiff.

For these purposes, "protected expression" means a stated opposition by Plaintiff to conduct that is prohibited by Title VII, including unlawful sexual harassment. To establish such "protected expression" Plaintiff must demonstrate that she had a reasonable belief that she opposed conduct prohibited by Title VII--and for that purpose, it is not necessary that Plaintiff was correct in that belief so long as she reasonably• believed it was so. In the context of this case, H adverse employment action" means a termination of Plaintiffs employment by Defendant. Finally, to establish a "causal link" between the protected expression and the adverse action, Plaintiff must show that even if she had not engaged in the protected expression and if everything else had been the *same,* she would not have suffered the adverse employment action.

If Plaintiff has not proved any of the three elements of this claim by a preponderance of the evidence, your verdict must be for Defendant on this claim.

December 16, 1999

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE MILTON I. SHADUR, Judge

(Whereupon the following proceeding were had in part via a telephone conference.)

THE CLERK: 96 C 6944, Hertzberg vs. SRAM.

THE COURT: Counsel, we have counsel here in court and also out in telephone land. So if we could first have the appearances reflected of counsel on the phone, and then counsel will do the same here in court.

MR. GOLTERMAN: Robert GOLTERMAN: and Neal Perryman for the defendant.

MS. McCARTHY: Suzanne McCarthy.

MS. GORMAN: Candace Gorman for the plaintiff.

THE COURT: I'll bet you couldn't hear them talking, could you?

MR. GOLTERMAN: We could not, your Honor.

THE COURT: Okay. So they are going to have to speak up as well.

I appreciate your making yourselves available, because I have indeed reviewed the submissions on both sides here.

THE CLERK: I think local counsel is here.

MS. KYTE: Good morning. Janet Kyte of Altheimer & Gray.

THE COURT: Good morning. It seems to me that there are some respects in which each side has fallen somewhat short of what's necessary in order to resolve this remaining issue, the one that is before me. Both sides of course have agreed --and we did this before we started with the jury that the issues of back pay and front pay, that is the issues affecting a claim of lost earnings, are a subject for the Court and not for the jury to determine. And I gather that that's not something that either side is retreating from at this point. So I suppose I ought to pose that first, because that's obviously the basic premise from which I proceed. That's fair, is it not, and continues to be a fair characterization of the plaintiff's position, right?

MS. GORMAN: Correct, your Honor.

THE COURT: And of the defendant's position?

MR. GOLTERMAN: That's correct, your Honor.

THE COURT: You have got to tell me since both of you are out there on the phone, why don't you tell me who is speaking before you make any statement? So who was it that spoke up at that point?

MR. GOLTERMAN: That was Golterman.

THE COURT: Now what flowed from that of course, although nobody really focused on it entirely, is that the record in the jury trial, because the question of lost

earnings wasn't before the jury for decision even as an advisory matter, as you know is sometimes done in employment discrimination cases, didn't necessarily provide all of the evidence that was relevant to the issue.

Now in this instance, as I started out by saying, it strikes me that both sides have been somewhat deficient in the analysis. Let me begin with SRAM's mistaken emphasis on the fact that Ms. Hertzberg I will refer to her just as "Hertzberg," with no disrespect intended. That's my usual practice in written opinions, and orally as well. It's not a chauvinist usage at all. So I am going to do that just as I refer to SRAM for shorthand reference.

As I was saying, the fact that Hertzberg didn't assert any claim of constructive discharge really is not relevant, because to frame the thing in that way is to make what is a purely semantic and not a real characterization. After all, in the law you know the term "constructive" is simply a term for something that doesn't necessarily equate to some legal concept though it satisfies that legal concept as a matter of law.

All of us know from other areas of the law about the term "constructive eviction." What "constructive eviction" means is not really eviction, but something that the law treats as eviction because other circumstances satisfy that. What we have then is a kind of fiction that is legally harmless, as long as we know what it means in the same way that quasi contract is not really a contract. When we see the word "quasi" our antenna goes up, because we know that we are also dealing with a fiction.

Now in this instance, remember that Hertzberg claimed that she was terminated by SRAM. All you have to do is look at her EEOC charge that I have got here, Plaintiff's Exhibit 23, in which she -- that was Exhibit H to SRAM's December 2d brief that objects to the lost pay claim, in which what she says here is in paragraph 1 of the EEOC charge:

> "On February 6th '95 I was discharged from my position of shipping coordinator."

And two, she says:

> "The reasons given for the discharge by my supervisor, Brian Lester, were job elimination and that I was being disruptive. The reason given by Mr. Lester for the difference in treatment was, 'Well, you are a woman.'"

In that regard there was a dispute in the testimony, of course, on that score. According to Hertzberg, she told Mr. Margelos that if the situation with Manuel Loyaza, that is if his claimed sexual harassment, didn't get better, she might have to resign. And then within a day I guess or thereabouts, Margelos, termed her as too disruptive. Whereas according to Mr. Margelos what happened instead was that Hertzberg said she was resigning. And then when she sought to recant and wanted to stay, he decided not to accept, very much like the situation: "You've made your bed, now you lie in it."

Now it may well be that Hertzberg's lawyers, in the nature of their presentation, may have shot themselves or their client in the foot on the retaliation claim by the instruction that limited adverse employment action to a termination of plaintiff's employment by the defendant. If you look at that instruction, that's how it read. So that if the jury accepted SRAM's version as to the tendered resignation and then the refused recantation, if it believed that wasn't a "termination" in that sense, it would rule against Hertzberg on that claim.

But having said that, and by the way, as you know one of the questions that came out from the jury was one that really talked about that, and that of course had to be responded to as I did in terms of the instruction. I was not in a position to be changing an instruction that had been given to the jury.

But if you look at the matter and accept for a moment SRAM's version: She resigned. And then she very quickly, without you know any material change in the employment relationship, said, "Wait a minute. I have changed my mind. Take me back" or "Keep me." And the response was "No way. You have tendered a resignation." That's why I hesitate to put it in offer and acceptance terms, because as all of us know, under contract law it might get a different answer. But the point is that it is certainly fairly to be considered the equivalent of a termination -- that is, a firing -- because she wanted to continue the employment relationship and SRAM didn't want to. In that sense it's fair to characterize her wish to remain despite tendering her resignation, but SRAM's refusal, as what might fairly be called a "constructive discharge." And I am not talking now about the magic terms, you know, for purposes of what's necessary to state a claim (an actionable claim) for employment law purposes, but rather the fact that under either party's version of the events Hertzberg's departure was equivalent to a termination, where the final decision to sever employment was SRAM's and not Hertzberg's.

Now what the jury did decide, and what therefore binds me in my decision as to the entitlement or disentitlement to the recovery of lost wages, is that what may reasonably be viewed as Hertzberg's termination under either side's scenario was not in retaliation for her complaints of sexual harassment. But even a minute's thought: tells us that the right question to ask in determining whether lost wages are recoverable is not that, but rather the simple and familiar question of causation -- that is, whether the employer

SRAM's unlawful conduct, which we know is unlawful from the jury's determination, in which the jury went on to find definitively was either malicious or involved deliberate indifference to Hertzberg and to her rights, whether that caused that component of damages.

Now it seems to me that if you understand that perspective, which I think is the obvious one in this lawsuit, it is also painfully obvious that the termination would not have taken place but for Manuel's harassment and SRAM's adjudicated malice or deliberate indifference. There was no other reason at all that accounted for what, even accepting SRAM's version of events, was Hertzberg's a statement that she was resigning. There isn't anything else. That was it.

Now remember that in the frequently encountered retaliation claim -- that is, with a straighout-out quitting by the employee ... the thing that may be necessary to convert that quitting into a constructive termination is a hostile environment such that no reasonable employee could be expected to stand it. And therefore that 's why the employee left. But that's of course because in that situation the final decision was the employee's decision. The employee left. And in order for the employee to say, "Well, even though I went, and even though I made the final decision, it was essentially because I was forced to," that's what's meant by constructive discharge in that situation, because there you have to have an intolerable environment in order to convert that into a action by the employer.

But here again there isn't any gainsaying that the final decision was SRAM's, not Hertzberg's, whichever party's view of events is to prevail. And so even if you were to assume that Hertzberg was not subjected to so hostile an environment by Loyaza's conduct, and by the single incident with Brian Lest:er Chat she testified to, that she was forced to quit, what can't be disputed here is that the final decision that terminated her employment with SRAM was a decision made by SRAM. And that therefore, in the straight but-for and proximate cause concept, supports the idea that the lost

wages are placed squarely on SRAM's doorstep.

Now what about the objection to quantifying those damages? First of all, from my view of the evidence here and the presentations of the parties, the objection that's framed to overtime for the entire period is entirely valid. On the evidence, there would be no need for overtime once the plant opened in Ireland, or more accurately I should say maybe once that plant was up and running, so that the European market no longer had to be handled out of the Elk Grove operation.

Now unfortunately all I have got on that score – and I searched through my notes, and I didn't have Jesse write up the transcript, but my notes are pretty thorough ... all I have, and also the exhibits as well -- all I have on that score is that occurred sometime in 1996. But obviously I don't want for this purpose to rely on the general proposition that is in part advanced by Hertzberg, that inferences are drawn against the wrongdoer who has made the ascertaimnent of damages more difficult. That's what the Supreme Court wrote in Bigelow against RKO Pictures, which I think was 1945 or '46 and is still good law ... that's what happens when you have a situation in which the quantification of damages and the uncertainty of it is created by the conduct of the wrongdoer. This one doesn't fit that doctrine in that sense. That ia, I think what we have is an ascertainable date, but simply that the record that's been put before me up to now doesn't demonstrate what it is.

So I would really guess I may be asking the parties ... maybe I've missed something, but I didn't note that there was anything in the record that would give that date, which I would think, as I say, should be readily ascertainable. And if it's not in the record now, given the fact that this is after all a bench review of an issue that's reserved for the bench, I am prepared to entertain evidentiary submissions from both SRAM and Hertzberg, or maybe you can simply get together and ascertain that to avoid any improperly adverse inference. As I say, I don't think that component

calls for the application of that doctrine. It's something that people really just didn't focus on under the circumstances.

MS. GORMAN: Could I say something now?

THE COURT: Sure.

MS. GORMAW: I believe Mr. Margelos testified that the plant opened just before he was fired. I believe the date of his firing is in the record.

THE COURT: I don't know. Wait a minute. Let me see it I have got ... I have got my notes on the testimony. Let me see here. Well, unfortunately all I have are a couple of notes at the very end of his direct examination that say that after Hertzberg left he had no recollection whether another manager or replacement was hired. Arid my note then says, "New plant, Ireland, handled the European market." But I wasn't attempting at that point, as you might guess, to reflect verbatim what it is.

But if that's the thing that you are referring to, Jesse I am sure could track it down, because this was literally the very end of his direct examination, which was in the afternoon of November 3d. So I can listen to that. But in the meantime both sides can go back and. see if you can provide me with that information. Because again that strikes me as the appropriate predicate for saying up until that time, with the reasonable inferences that are called for there, it's reasonable to say that the expectations of continued overtime would function, but that thereafter they would not.

MS. GORMAN: Your Honor, are you saying that at the time of the opening or could we argue that it would be sometime after, because there would be a transition involved?

THE COURT: Well, I think some limited period of time, obviously for them to - - that 's why I say to be up and running so that they are handling it. So that's something that you can look into. Okay?

Second thing that I wanted to say is that based on the evidence, I find it reasonable for Hertzberg to claim that her continued employment should include time after the closing of the Elk Grove Village plant, when according to the evidence there was a transfer to the local facility handling the same shipping and receiving functions, and indeed the availability of employment in the downtown Chicago office, as to which I found the testimony of Ms. Whatmore to be credible about that availability.

The next point is that SRAM'S brief over here at page 13 appears to be correct in disputing the late assertion of less, than 35 hours of work at this Land Planning Services for any time after the first couple of weeks. And accordingly I expect that the calculation is going to be based, not on any drop down to the 30 hour thing, which really was a late suggestion. So I am going to find it in terms of the straight 35, you know, and not the drop down, after the first couple of weeks, as I recall.

The next item is that the assumption as to corresponding increases in compensation as between SRAM and the new job that was acquired by Hertzberg is legitimate, particularly given the fact that any other premise would necessarily result in undercompensating somebody. That is, it seems that it is a reasonable predicate to treat the hypothetical continuation with SRAM to which she was entitled as basically marching in lockstep, so far as increases are concerned, with those that she derived in that new employment. And that it is also I think in this instance the date of ... the actual date of the salary increase in her new job, even though originally it had been thought there was a different date involved. There was one as to which there was a disparity between the original calculation based on one date in what was it, in '96 and the other date. So the actual date is

what is going to control.

Next thing is that a prejudgment interest rate of 5 percent, which is what was involved in the calculation, is both reasonable and conservative. You know that the Seventh Circuit has, in addition to its holding beginning in that, what was it, that Gorenstein case that said that federal question claims carry with them presumptively prejudgment interest; the later Seventh Circuit cases have held, as I, recalled, as I started to write this, that the prime rate was basically a realistic rate and in candor tends to be conservative. But I think that the 5 percent rate, which is what was adopted in the calculations here, is something that I am accepting for that purpose.

The last item that I wanted to mention is that as far as this fight about FICA, any component of damages that includes or does not include FICA, should basically put the employee in the same position as if there been no violation of law by SRAM -- in other words, to the extent that SRAM will not at this point contribute to FICA because of a lump sum current payment:, and the fact that she is not now an employee. And I am not commenting on it. That's really a question of law as to how FICA operates in those terms, and also taking into account her income level, because as you know compressing several years into the same time can push you over the top as far as FICA contributions is concerned.

What I am saying is that Hertzberg is entitled to be put into exactly the same position economically, so far. as FICA contributions are concerned, as if she had stayed in the job. And that I think should be a calculation that should not be difficult, you know, once it's placed in terms of what the facts are. But I don't have those facts. So you see what it comes down to is that that I really need added proof to enable me to make the calculation.

Now this again, I recognize that you may think of this as being post closing of proofs. But it's really not, given the fact that the jury was not asked ... and properly

was not asked ... to decide this issue. So it's really a matter of proof before me, as though this were a bench trial limited to the lost wages issues.

Now having said all of this, and recognizing that you are going to have to go back and get some factual information for presentation, as well as massaging the numbers, what's everybody's judgment about how soon you could provide that to me so that we can end up with a final judgment on the case as a whole?

MS. McCARTHY: Your Honor, that will be my task to work with. I can ... I am leaving to go out of town today, but I will be still working. So if I could have through next week. The problem that I have is whether the people that I used to crunch numbers are going to be available, given the holidays coming up.

THE COURT: But are you also going to be able to get some of this factual information that's needed before the numbers can be crunched?

MS. McCARTHY: Sure. Because the very same people are very familiar with all of the ... what we have to do is break down the components of how social security benefits are calculated. We already have spreadsheets. They have it on their computer. So.... --

THE COURT: But you also need the information, for example, about the plant in Ireland. And they have got to do a total recalculation on the overtime, dropping it out of the period... now dropping it out is not going to be a problem. The problem is going to be identifying the breakpoint. Okay.

MS. McCARTHY: All right.

THE COURT: I am not sure that your

people are in a position to do that. That's something that the parties are going to have to look into.

MS. MCCARTHY: As soon as we have an agreement, we have a lot of this on Lotus spreadsheets. All we have to do is drop in the numbers and recalculate everything out.

THE COURT: Okay.

MS. McCARTHY: So the timing from my standpoint, after we have an agreement about when overtime stops -- and I guess because I don't anticipate that we are going to reach an agreement amongst ourselves, since we have never been able to reach an agreement on anything, I would suggest that we make a submission about what it is that we think and have the Court rule. And once you issue a ruling, I can promise to do that posthaste.

THE COURT: But wait. The only thing that needs to be resolved, as I understand it, other than working the numbers, is to ascertain that one date.

MS. GORMAN: I have one idea. They have a web page. I believe, because I looked like at it before this trial, they have a calendar on their web page. So that 's one place I am going to go. I don't know if it does it by months. But remember they announced on the web page the opening of the facility in Ireland. I don't now anticipate that will be very hard to ascertain, either through the help of defense counsel or else calling Ms. Whatmore, who might be familiar with the date too.

THE COURT: You also remember we will need something -- I don't know how they function internally ... but you are quite right in pointing out that for a plant to get up to speed in terms of the actual handling of the

shipment aspects, that's something that doesn't occur instantaneously with breaking a bottle of champagne over the hull of the plant, you know

MS. McCARTHY: I can get Mr. Hertzberg's testimony, who is familiar with SRAM's operation, because there was testimony that indeed in fact there was ... they continued to ship out of Illinois for their worldwide. So we can get some additional information. So all I am suggesting is that once we get the date of the closing ... or of the opening ... of this Ireland plant, I belive you told Ms. Gorman there might be some period of time thereafter which is going to be the up-to-speed part. So all I am suggesting is that once we agree on whatever that date is, as far as getting the rest of the analysis, I don't anticipate that it will take me very long to do.

THE COURT: Suppose that ... how long are you going to be out of commission?

MS. Mc CAR THY: I live in New Jersey.

THE COURT: Okay.

MS. MCCARTHY: And I commute here every week. I am going to be working out of the home.

THE COURT: Okay. Suppose I shoot for a submission to me by a week from Tuesday ... that is, the 28th. Do you think that you would be able to hit that? MS. McCARTHY: Yes.

THE COURT: If so, then the calculation of interest -- for all of the calculations, for example, the interest would be as of December 31st. Because what I will then do is I will enter the order basically on that premise.

Now obviously what you will want to do, given that, is probably to make that calculation and then include a per diem provision, so that you know if we miss the target we don't have to go back to the computer again. Okay?

Now is there any misunderstanding about what I have dealt with today?

MR. GOLTERMAN: Your Honor, this is Robert Golterman. In terms of additional information for the record relating to the Ireland plant --

THE COURT: Yes.

MR. GOLTERMAN: -- we can certainly, and we will work with counsel for Ms. Hertzberg, and we can certainly provide by affidavit something from the President of the company saying when the plant opened, and even look at the amount of shipping that occurred in the first few months in that plant.

THE COURT: Or what I think is sensibly suggested is at the same time look at the impact on shipping in the Elk Grove facility. Because that then will also give you a good handle on what 's an appropriate time for the presumption that I think is the reasonable presumption: that the work pattern would have continued in much the same fashion at the Elk Grove plant. And by the way, I recognize in what I have suggested and indicated as my rulings this morning, there is force in the notion that there was need for a heavier workload while Elk Grove's whole pattern was building up as well. But it seems to me that's quite a reasonable mesh with the fact that the workload would also be expected to drop down once you got the second facility in place. So I don't really have to separate those two concepts, as I understand the record as I had it on my own review of the testimony.

But you are quite right that obviously I want to have not just the calculations of record, but I want to have a record to support the idea of picking the particular date for purposes of the calculations. So you are absolutely right on that.

MR. GOLTERMAN: The only other thing I wanted to mention is that with respect to all of these issues, obviously our papers contain all of our positions. But just for the record, I would certainly object at this point: to any testimony by affidavit or otherwise from, for example, the former Mr. Hertzberg regarding any issues about shipping out of Chicago or worldwide. I think that's way beyond the scope of what the Court would get at this point to make a decision on overtime.

THE COURT: Well, now wait a minute. I don't know what has to be done in terms of factual presentations. All I am interested in, as I have indicated, is a factual submission that is appropriately supportable that deals with what that transition date should be.

Now I am not ... certainly not ... encouraging what amounts to narrative testimony or evidence from an outside observer who is just basing something on general recollections. I am not encouraging that at all. But I am anticipating that we will have enough from you people to provide an objective answer to the question that I have put. If that's so, as far as I am concerned, that will be it. Okay.

MR. GOLTERMAN: Okay.

THE COURT: Thank you all. I appreciate it. I will look forward to get the submissions. Okay?

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE – ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: February 28, 200

Footnotes

[1]In that respect, it is puzzling why Motion ¶5 has put quotation marks around the word "comprises." On that score the Judgment Order uses that word in just the right way, as meaning "is made up of." See attached page 4 from Morton Freeman, The Grammatical Lawyer (ALl-ABA 1979), explaining the common misuse of the word that is reflected in the frequently—seen incorrect usage under which "comprises" is used to connote "is comprised of . . . ."

[2] As these references to the December 16 ruling indicate, for the most part SRAM's current Motion advances contentions that it has made before and that this Court has previously found wanting. That is equally true of the objections referred to in the next paragraph of the text.

No. 96 C 6944

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

JULIE K. HERTZBERG,
Plaintiff,

v.

SRAM CORPORATION,
Defendant.

Docketed March 3, 2000

AMENDED JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of Julie Hertzberg and against SRAM Corporation in the aggregate sum of $71,829.18.

No. 96 C 6944

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

JULIE K. HERTZBERG,
Plaintiff,

v.

SRAM CORPORATION,
Defendant.

December 23, 1996, Decided

December 24, 1996, DOCKETED

**COUNSEL:**
For JULIE K HERTZBERG, plaintiff: Suzanne McCarthy, Chuhak & Tecson, P.C., Chicago, Il.

For SRAM CORPORATION, defendant: David Brian Ritter, Janet M. Kyte, Altheimer & Gray, Chicago, IL. Neal F. Perryman, Robert J. Golterman, Lewis, Rice & Fingersh, St. Louis, MO.

**JUDGES:**
Milton I. Shadur, Senior United States District Judge

**OPINION BY:**
Milton I. Shadur

**OPINION:**

MEMORANDUM OPINION AND ORDER

SRAM Corporation ("SRAM") has filed its Answer and Affirmative Defenses ("ADs") to the employment discrimination Complaint brought against it by its ex-employee Julie Hertzberg ("Hertzberg"). This sua sponte opinion is occasioned by aspects of SRAM's responsive pleading that are in some instances unacceptable, and in others merely dubious.

In response to Hertzberg's allegations as to Jurisdiction (Complaint P1) and venue (Complaint P2), SRAM's counsel have answered respectively that Hertzberg "seeks to invoke the jurisdiction of this court" and "seeks venue in this division of this court," then going on to continue in each answering paragraph:

> Except as specifically admitted herein, defendant denies the allegations contained in Paragraph --.

At a minimum Answer P2 in that form must be stricken, and SRAM owes a better explanation as to Answer P1.

As for Answer P2, it is clear from SRAM's express admissions of Answer PP3, 4, 7 and 8 that, as Complaint P2 alleges but Answer P2 purports to deny:

> The acts complained of and the events at issue all took place in this district.

Unless there is considerably more here than meets the eye (and than SRAM has itself said), SRAM's denial is no better than frivolous--and Answer P2 is therefore stricken.

As for Answer P1, both that paragraph and two of SRAM's ADs (Answer PP27 and 28) challenge this Court's jurisdiction. It appears from Answer P27 that SRAM's contention in that respect stems entirely from Hertzberg's

claimed "failure to satisfy all the jurisdictional prerequisites to filing suit in federal district court under *42 U.S.C. § 2000e*, et seq."

But Hertzberg has attached EEOC's right-to-sue letter as her Complaint Ex. 1, and Complaint P6 affirmatively alleges her fulfillment of all conditions precedent to bringing this action, including her timely filing of a charge of discrimination. And in terms of filing suit, this action was brought well within 90 days after the EEOC letter. Because SRAM's counsel must return to the drawing board in any event, it will be necessary for them to flesh out their claim of the absence of subject matter jurisdiction (an issue that, if challenged in bona fide terms, this Court must of course confront at the outset).

Another impermissible portion of the responsive pleading is found in Answer P5, as to which SRAM begins by stating:

> Paragraph 5 contains a legal conclusion to which no response is required.

That of course is simply wrong--nothing entitles counsel for a pleader to decide for himself or herself that "no response is required" because an averment is considered a "legal conclusion." Quite to the contrary, no less an authority than the Supreme Court has made it plain that legal conclusions play a recognized role in the notice pleading regime that is embodied in the Federal Rules of Civil Procedure ("Rules")--see *Neitzke v. Williams, 490 U.S. 319, 325, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989)*(emphasis added), quoted again in

> *Denton v. Hernandez, 504 U.S. 25, 31, 118 L. Ed. 2d 340, 112 S. Ct. 1728 (1992):*
> By logical extension, a complaint, containing as it does both factual allegations and legal

> conclusions, is frivolous where it lacks an arguable basis either in law or in fact.

And Rule 8(b) requires that a litigant respond to every averment (by definition including what the litigant may regard as "legal conclusions") in a complaint. If SRAM really denies its own status as an "employer" within the Title VII definition, again it must explain why in its amended pleading that is required by this opinion.

Finally, four of SRAM's six ADs are also problematic. Rule 8(c) embodies the AD concept as essentially akin to the common law plea in confession and avoidance: It admits all of the allegations of a complaint, but then goes on to advance a reason why defendant is not liable to plaintiff anyway (or, as in the case of comparative negligence, may be liable to plaintiff for less than plaintiff claims). See this Court's discussion of Rule 8(c) in *Bobbitt v. Victorian House, Inc., 532 F. Supp. 734, 736-37 (N.D. Ill. 1982),* a decision approved in *Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989).*

In those terms:

> 1. Answer PP27 and 28 have already been revealed as directly contrary to the allegations of Complaint P6. That being so, SRAM's denial of those allegations in Answer P6 puts those matters at issue, and the ADs are accordingly stricken.
>
> 2. Answer P26 is the equivalent of a Rule 12(b)(6) motion, asserting that "the Complaint fails to state a claim upon which relief can be granted." But accepting Hertzberg's Complaint allegations as gospel, as this Court must do in evaluating a Rule 12(b)(6) challenge and as SRAM must do under Rule 8(c), that assertion of legal insufficiency is a loser.

3. Answer P31 says that Hertzberg "voluntarily resigned her position with defendant"--a statement at direct odds with Complaint P16, and hence also required to be stricken as an AD.

Accordingly Answer PP26-28 and 31 are stricken and are not to be included in the Amended complaint required in the following paragraph.

Because a material part of the Answer and ADs must thus be discarded, all parties would be best served by SRAM's filing of a self-contained Amended Answer and Affirmative Defenses to replace the present pleading. And because the errors identified here clearly appear to be lawyer-generated, SRAM's counsel are directed not to impose the cost of any attorneys' fees and out-of-pocket expenses on their client in connection with this second pleading go-round.

Milton I. Shadur

Senior United States District Judge

Date: December 23, 1996